No. 87-1614

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioners John W. Martin, *et al.* submit this reply brief in support of their Petition for *Certiorari* (the "Petition") in order to respond to arguments first raised in the briefs submitted by the United States, respondents Robert K. Wilks, *et al.* (the "Wilks respondents") and the International Association of Firefighters as *amicus curiae* ("*amicus*"). The United States urges the Court to grant *certiorari* on the first issue, and the Wilks respondents request that if the Court grants *certiorari* on that issue, it should also grant *certiorari* on the second issue. Petitioners urge the Court to grant *certiorari* on both issues presented in the *Martin* Petition.[1]

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1 The questions presented in the *Martin* Petition are:

1. May persons affected by court-approved consent decrees containing race-conscious relief challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

I. THIS COURT SHOULD GRANT *CERTIORARI* TO CONSIDER WHETHER COURT-APPROVED CONSENT DECREES MAY BE COLLATERALLY ATTACKED BY PERSONS WHO HAD NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ENTRY OF THOSE DECREES.

The United States agrees with Petitioners that the Court should grant *certiorari* on the first question presented in the Petition. *See* U.S. Br. at 8, 10.[2] Only the Wilks respondents (and *amicus*) oppose *certiorari* on that issue.

A. This Issue Was Not Resolved in *Local 93*.

The Wilks respondents and *amicus* argue that this Court resolved the collateral attack issue in *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986) ("*Local 93*"). Wilks Br. at 7-10; *Amicus* Br. at 2-4; *see also* U.S. Br. at 8-9 n.8. That argument is wrong. *Local 93* was a direct appeal from the district court's approval of a decree, not a collateral attack.

The union in *Local 93* timely intervened in the consent decree litigation (*see* 106 S. Ct. at 3067); it did *not* raise its claim in a collateral lawsuit, as did the reverse discrimination plaintiffs here. Moreover, the Court in *Local 93* expressly recognized the policies that should bar collateral attacks:

> "[I]t is likely to be easier to channel litigation concerning the validity and implications of a consent decree into a single forum--the court that entered the decree--thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations." *Id.* at 3076 n.13 (citation omitted).

Finally, the Court there expressly did not consider whether the union could raise its claim. Because the union had not yet challenged the consent decree under § 703 of Title VII or the Equal Protection Clause (it had argued only that any consideration of race was improper) (*see id.* at 3071 n.5), the Court concluded that "[w]hether it is now too late to raise such claims, or--if not--whether the Union's claims have merit are questions that must be presented in the first instance to the District Court". *Id.* at 3080. Here, the reverse discrimination plaintiffs' arguments were presented by their present counsel to the district court at the time that that court reviewed the decrees, even though their later application to intervene was held to be untimely.

B. The Courts of Appeals Remain in Conflict After *Local 93*.

The Wilks respondents also argue that the courts of appeals have not reached conflicting results on the collateral attack issue after *Local 93*. Wilks Br. at 12-13. But the Second Circuit's decision in *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988), which was after *Local 93*, conflicts with the Eleventh Circuit's decision below. Even the Wilks respondents acknowledge this recent conflict, though they argue unconvincingly (as shown below) that *Marino* presented a different issue. *See* Wilks Br. at 10-13. In addition, although the Seventh Circuit recently had said that collateral attacks were permissible (*see Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986)), it still more recently has said that, in light of this Court's decision in *Marino*, "[i]t therefore remains unclear" whether collateral attacks are permissible. *Zipes v. Trans World Airlines, Inc.*, No. 86-2731, slip op. at 12 n.9 (7th Cir. May 6, 1988). *See also Feller v. Brock*, 802 F.2d 722, 728-29 & n.6 (4th Cir. 1986) (vacating an injunction in a collateral attack after *Local 93*). As the United States concedes, this issue "continues to divide the courts of appeals",

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2. Did the Court of Appeals err by remanding this case to the district court with instructions to apply "heightened scrutiny" above and beyond the standards established by this Court for evaluating race-conscious relief under Title VII rather than affirming the district court's decision that the decrees are lawful remedial devices?

This Petition seeks review of the same court of appeals decision as the petitions in Nos. 87-1639 and 87-1668.

2 The form of citation to the briefs is as follows: the Brief for the United States is cited as "U.S. Br."; the Brief in Opposition to *Certiorari* to the United States Court of Appeals for the Eleventh Circuit of Respondents Robert K. Wilks, *et al.* is cited as "Wilks Br."; the Brief *Amicus Curiae* of the International Association of Firefighters, AFL-CIO, in Support of Respondents is cited as "*Amicus* Br.".

and the conflict is "apparently growing". U.S. Br. at 8-9 & n.8.

C. The First Question Presented in this Petition is the Same as that Considered in *Marino*.

The question presented but not resolved by this Court in *Marino*--"whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation" (*Marino v. Ortiz*, 108 S. Ct. 586, 587 (1988))--is, contrary to the Wilks respondents' argument, precisely the issue raised here. *See* n.1, *supra*; *accord* U.S. Br. at 8. The Wilks respondents' attempt to distinguish *Marino* is untenable. Their assertion that this case is not "a facial attack on the decrees" (Wilks Br. at 12) is flatly contradicted by their own prayer for relief to enjoin the City from, *inter alia*, "[e]nforcing or complying with the provisions governing promotional goals or quotas relating to Fire Department promotions" set forth in the decrees. App. at 115a. It is also contradicted by the Eleventh Circuit's remand to consider whether the decrees' race-conscious relief is lawful. *See* App. at 17a-20a. Moreover, this case raises the collateral attack issue more directly than did *Marino* because the order challenged there was an "interim order" rather than, as here, a final consent decree. *See Marino*, 108 S. Ct. at 587.

D. The Denial of Intervention in the *Jefferson County* Litigation Does Not Warrant Allowing a Collateral Attack in this Case.

The Wilks respondents, the United States and *amicus* all argue that the collateral attack here is appropriate because the Birmingham Firefighters Association ("BFA") and two of its members were denied intervention in the underlying consent decree litigation. *See* Wilks Br. at 15 n.9; U.S. Br. at 9; *Amicus* Br. at 5-6; *see also United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983). Although Petitioners agree with the premise of their argument--that the BFA and its attorney, Mr. Fitzpatrick, represented the interests of Mr. Fitzpatrick's present clients--their conclusion does not follow. The BFA members "knew at an early stage in the proceedings that their rights could be adversely affected"

(*United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983)), yet they waited to file their motion to intervene until *after* the lawfulness of the consent decrees was submitted to the district court for decision. That motion was properly denied as untimely.[3] Nonetheless, the district court "fully considered their objections". *Jefferson County*, 28 Fair Empl. Prac. Cas. at 1839. The Wilks respondents have had their opportunity for a day in court.

The denial of intervention was correct for the same reasons that collateral attacks should be prohibited. Once a court has considered, after notice and a hearing, whether a consent decree containing race-conscious relief satisfies Title VII and the Equal Protection Clause, it should not have to redecide the same question with every employment decision made pursuant to the decrees, regardless of whether the challenge is raised by untimely intervention or collateral attack.

II. THE COURT SHOULD GRANT *CERTIORARI* TO CORRECT THE MISAPPLICATION OF *JOHNSON* BY THE COURT OF APPEALS.

A. This Issue Is Ripe for the Court to Consider.

The United States argues that the second issue raised in the *Martin* Petition--whether the court of appeals misapplied this Court's decisions in *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987), and *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)--is "premature" because "the district court has not yet considered the *Wilks* respondents' claims under Title VII and the Equal Protection Clause". U.S. Br. at 11 n.10. That argument is wrong.[4] The district court held in

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3 If the BFA had filed its motion to intervene *before* the fairness hearing, its motion should have been granted. *See Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986) (reversing the denial of intervention after the parties signed a proposed decree but before the court's fairness hearing).

4 The United States's argument also flies in the face of the promise that it made in the consent decrees to "defend the lawfulness of such remedial measures [required by, or permitted to effectuate the terms of, the decrees] in the event of challenge by any other party to this litigation or by any other

1985, just as it had held in 1981, that "[t]he City Decree is lawful". App. at 61a, 106a. Significantly, the Wilks respondents do not make the same argument. Indeed, they believe that the second issue is ripe for the Court to consider if the Court grants *certiorari* on the first issue. *See* Wilks Br. at 20.

Respondents' assertion that the 1985 trial was limited to whether the City had complied with the City Decree is not correct. *See* U.S. Br. at 6; Wilks Br. at 5-6 & n.5. They argued to the district court and to the court of appeals that the City was obligated by the City Decree *as well as* by Title VII and the Equal Protection Clause to compare the qualifications of candidates certified by the Personnel Board as eligible for promotion.[5] The district court held that there was no such obligation. App. at 61a, 105a. Indeed, the district court found that the "hodge podge" of selection criteria that respondents would have the City apply was not a job-related selection procedure at all (*id.* at 64a, 108a), which therefore would have exposed the City to Title VII liability if it had compared qualifications as respondents advocate. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (selection procedures with an adverse impact violate Title VII unless they are job-related). The conclusion that the City had no obligation to compare qualifications beyond the comparison done by the Personnel Board led the court of appeals to instruct the district court to apply "heightened scrutiny" to whether the decrees unnecessarily trammel the rights of white employees. App. at 19a-20a. That issue was decided by the district court and is ripe for review by this Court.

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person or party who may seek to challenge such remedial measures through intervention *or collateral attack*". App. at 125a, 205a (emphasis added). Despite its unequivocal promise to "defend" the decrees from "collateral attack", the United States urges that plaintiffs' collateral attack be remanded to be tried.

5 *See* Plaintiffs' First Pre-Trial Memorandum at 26-29, 36-38; United States' Pre-Trial Submission of Proposed Demonstrative Evidence at 3; Eleventh Circuit Brief for the United States at 52-53; Eleventh Circuit Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.* at 63-66; Eleventh Circuit Supplemental Brief of Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.* at 11-15, 20-21; Eleventh Circuit Supplemental Brief for the United States as Plaintiff-Intervenor-Appellant-Cross-Appellee at 7-11, 14-17.

B. The "Heightened Scrutiny" Instruction Conflicts with *Johnson* and *Weber*.

The court of appeals concluded that "we are compelled to the conclusion that the district court should subject the consent decrees to *heightened scrutiny* under the second prong of the *Johnson* analysis". App. at 20a (emphasis added). That standard is nowhere to be found in *Johnson* (or any of this Court's other Title VII cases), and no other court of appeals has construed *Johnson* as requiring "heightened scrutiny" under the trammeling prong.[6]

The United States seems to argue that the "heightened scrutiny" language was meant not as a standard for the district court to apply but simply to "remind[] the district court to consider whether the consent decrees 'unnecessarily trammeled' plaintiffs' rights." U.S. Br. at 10-11. The Wilks respondents, in contrast, view that language as a standard. *See* Wilks Br. at 18-19. They accentuate the court of appeals's error by arguing that such a "heightened scrutiny" standard for *Title VII* analysis is supported by this Court's application of "heightened scrutiny" under *Equal Protection* analysis. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1846 (1986) (plurality opinion); *id.* at 1861 (Marshall, J., dissenting). Respondents' differing constructions of the "heightened scrutiny" instruction demonstrates that the decision below, if left standing, will lead lower federal courts to misapply *Johnson*.

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6 The United States argues that the court of appeals "quite properly" noted the decrees' "natural potential . . . [to] trammel the interests of nonminority employees". U.S. Br. at 10. The United States argued exactly the opposite to the district court at the fairness hearing: "we believe that under Supreme Court decisions and relevant Fifth Circuit law that the provisions of the decree, including the affirmative hiring and promotional relief, are lawful and proper." *United States v. Jefferson County*, Hearing, Aug. 3, 1981, Tr. at 40; *see also United States v. Jefferson County*, Response of United States to Objections to the Proposed Consent Decrees at 9-10. Thus, the United States's argument here that the "court of appeals correctly instructed the district court to apply the factors this Court articulated in *Johnson* . . . and *Weber*" (U.S. Br. at 10 (citations omitted)) is contrary to its position in the consent decree litigation, is in breach of its promise to defend the decrees (*see* App. at 125a, 205a) and is simply wrong.

Furthermore, the Wilks respondents argue that the "heightened scrutiny" standard is appropriate because "the City never compared relative qualifications, [and] made no attempt to use a job-related selection procedure" (Wilks Br. at 17), suggesting that the City made promotions without regard for whether a candidate was qualified. That implication is flatly wrong. Under state law, the City may promote only persons certified by the Personnel Board as qualified, and the Personnel Board certifies the highest ranking candidates under the "rule of three", whereby three candidates are certified for a job opening.[7] Before the decrees, the City never had its own selection procedure in addition to the Personnel Board's procedure, and nothing in the decrees changed that practice. *See* App. at 30a, 80a.

C. The Court Should Not Reconsider *Weber*.

The Wilks respondents argue that if *certiorari* is granted on the second issue, the Court should reconsider *Weber*. *See* Wilks Br. at 20-21. *Weber* should not be reconsidered. The district court relied upon *Weber* when it approved the decrees in 1981 (*Jefferson County*, 28 Fair Empl. Prac. Cas. at 1836) and again when it rejected the reverse discrimination plaintiffs' claims in 1985 (App. at 61a-62a, 106a-107a). In any event, there is no basis for reconsideration. The lower federal and state courts have relied upon *Weber* hundreds of times, and this Court expressly reaffirmed *Weber* last year in *Johnson*. *See* 107 S. Ct. at 1449-52.

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7 Because the Personnel Board's selection procedures tended to exclude blacks (*see, e.g., Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. Jan. 10, 1977), *aff'd*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (entry-level police and fire examinations violated Title VII)), the consent decrees modified the "rule of three" only by requiring the Personnel Board to certify additional *qualified* blacks and women if necessary for the City to meet its goals. *See* App. at 213a-216a.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, the Court should grant a writ of *certiorari* to the Court of Appeals for the Eleventh Circuit to consider both questions presented in the *Martin* Petition.

June 3, 1988

Respectfully submitted,

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